

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
December 17, 2003 Session

**FLOYD BOULDIN v. WARREN COUNTY SHERIFF'S DEPARTMENT
AND WARREN COUNTY, TENNESSEE**

A Direct Appeal from the Chancery Court of Warren County
No. 8140 The Honorable John Rollins, Judge

No. M2003-00602-WC-R3-CV - Mailed - January 26, 2004
Filed - February 26, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. 50-6-225(e)(3). Defendant challenges the admission of expert medical opinion as based on erroneous records and insists the amount of the award is excessive because it exceeds the two and one-half times cap. We affirm the judgment of the trial court.

Tenn. Code Ann. 50-6-225(e) (1999); Appeal as of Right: Judgment of the Chancery Court is affirmed

JOHN A. TURNBULL, Sp. J., delivered the opinion of the court in which FRANK DROWOTA C.J., and HOWELL PEOPLES, SP. J., joined.

Larry B. Stanley, McMinnville, Tennessee, for Appellants, Warren County Sheriff's Department and Warren County, Tennessee.

Barry Medley, McMinnville, Tennessee, for Appellee, Floyd Bouldin.

OPINION

I. Facts and Procedural Background

The seventy-one year old plaintiff, Floyd Bouldin, worked for the Warren County Sheriff's Department as a transportation officer and court bailiff. On April 10, 2001, Bouldin was transporting a prisoner when the prisoner became unruly, scuffled with Bouldin and wrenched his left arm and shoulder. Bouldin, upon his report of injury, was referred by his employer to Dr. Donald M. Arms, a local orthopedic surgeon, who had previously seen Bouldin for other ailments. Dr. Arms diagnosed a torn rotator cuff and initially treated him conservatively. When the injury did not respond, surgery was performed on July 16, 2001. Even though the MRI had demonstrated a probable partial rotator cuff tear, during surgery Dr. Arms found no rotator cuff tear. Instead, he found severe degenerative arthritis in the shoulder joint. Dr. Arms performed an open distal clavicle excision (removing the arthritic end of the collar bone) and cleaned out the arthritis and bursitis in the shoulder joint. Since Bouldin had not suffered shoulder symptoms before the trauma of April 10, 2001, Dr. Arms testified: "I'm at least 51 percent sure that the trauma ... led to his symptoms," ... "the pain and symptoms that he had and the need for surgery is the result of his work injury."

Mr. Bouldin returned to work at a lighter duty job and worked for approximately eight months guarding prisoners in the exercise yard and on clean up duties, and transporting prisoners to court sessions in which he acted as bailiff. Mr. Bouldin resigned his employment on July 31, 2002, two years before his county retirement would have vested. Mr. Bouldin stated, and his wife confirmed, that he quit because his shoulder and arm were so weak he could not safely perform his duties; he feared his condition could place himself and others in danger.

Dr. Arms assigned a seven percent permanent partial impairment to the body when he last saw Bouldin in December 2001. Not satisfied with that rating, Bouldin's attorney referred him to Dr. Robert Landsberg for an independent medical exam which was performed on August 21, 2002. Dr. Landsberg reviewed Dr. Arms records in which Dr. Arms had indicated a partial rotator cuff tear, and assumed that Dr. Arms had, in fact, found the rotator cuff tear during his surgery. Dr. Landsberg did not, and could not have known, that Dr. Arms would later testify that he found no rotator cuff tear during surgery. Dr. Landsberg found decreased strength and loss of motion and was of the opinion that the AMA Guides to the Evaluation of Permanent Impairment 5th edition required impairments of six percent to the extremity for decreased range of motion and three percent to the extremity for loss of strength in addition to the ten percent extremity impairment for the distal clavicle resection. Dr. Landsberg combined these extremity impairments, and related them to the body as a whole for an eleven percent permanent partial impairment rating. In addition, Dr. Landsberg assigned significant left arm restrictions: no lifting over five pounds above the shoulder, avoid repetitive reaching to

the side, avoid lifting over ten pounds with arm extended; and no lifting over twenty pounds with elbow and arm close to the body. Dr. Arms assigned no permanent restrictions, and performed no AMA Guidelines approved strength or motion testing.

At trial, defendant objected to the expert opinion testimony of Dr. Landsberg, arguing that the opinions were based on inaccurate medical records. Because Dr. Landsberg erroneously assumed a partial rotator cuff tear, defendant insisted his entire testimony regarding impairment and restrictions should be stricken. The objection was overruled by the Chancellor who held that "... what we're talking about here is not an admissibility issue, but a credibility and weight issue." The Chancellor made an award of thirty percent permanent partial disability to the body as whole, implicitly finding that the award was not capped at two and one-half times the impairment rating.

Analysis

We are to review the record anew, with the presumption that the factual findings of the trial court are correct unless the preponderance of the evidence is otherwise. See Tenn. Code Ann. 50-6-225 (e) (2); *Mannery v. Wal-Mart Distribution Ctr.*, 69 S.W.3d 193, 196 (Tenn. 2002). A trial court's decision regarding the credibility of witnesses who testify live is entitled to considerable deference on appeal, *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996) and should not be reversed absent an abuse of discretion. *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 544 (Tenn. 1992).

Expert Opinion Foundation

Defendant insists the trial court erred in admitting into evidence and considering the expert opinion testimony of Dr. Landsberg, and relies upon the final sentence of Rule 703, Tenn. Rules of Evidence: "The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate a lack of trustworthiness." The trial court's decision on the admissibility of the expert testimony is within the discretion of the trial court and will be disturbed only where there is an abuse of discretion, or where discretion is arbitrarily exercised. See *Coe v. State*, 17 S.W.3d 193 (Tenn. 2000); *State v. Ballard*, 855 S.W.2d 557 (Tenn. 1993). Even though Dr. Landsberg erroneously assumed that the initial injury included a partially torn rotator cuff, there is no indication that his challenged opinions on percent of permanent impairment or restrictions were impacted in any way by the erroneous assumption. The operation, a distal clavicle excision or resection, is rated as indicated by both Dr. Arms and Dr. Landsberg under the AMA Guides, at Table 16-27 on page 506. Whether that operation was occasioned by an aggravation of an underlying arthritic condition, or by a partially torn rotator cuff, the rating would be done in the same manner. The difference in

opinion between the doctors relates only to interpretation of the AMA Guides with reference to additional impairments for loss of strength or motion. We hold that the trial court correctly admitted into evidence the expert opinions of Dr. Landsberg regarding impairment and restrictions.

Vocational Disability Award

Plaintiff has a ninth grade education and obtained his G.E.D. He received mechanic training in the Air Force. His past relevant employment includes farming, cutting cross ties for a railroad, labor in an aluminum plant, driving trucks, as well as his job with the Warren County Sheriff's Department. He testified that his arm and shoulder limitations would not permit him to perform any of his past jobs. The award of thirty percent disability to the body as a whole is modest if it is not capped by the two and one-half (2-1/2) times cap provided for in Tenn. Code Ann. 50-6-241 (a)(1). The defendant insists that the caps apply and limit the recovery to two and one-half times the impairment rating of Dr. Arms, or seventeen and one-half percent. See, Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625 (Tenn. 1999). The critical issue is whether Bouldin made a "meaningful return to work" following his surgery. Lay v. Scott County Sheriff's Dept., 109 S.W.3d 293 (Tenn. 2003). It is undisputed that he did return to work and that his duties were accommodated to his impairments. The trial judge obviously believed Bouldin's testimony that he quit because his shoulder and arm were so weak he could not longer safely perform his duties. This implicit credibility finding is entitled to considerable deference on appeal. See Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 62 (Tenn. 2001).

The question remains whether his resignation was "voluntary" since "an employee cannot avoid the statutory caps and thereby augment his award through his unilateral acts when those acts are unrelated to the injury." Lay v. Scott County Sheriff's Dept., 109 S.W.3d 293, 299 (Tenn. 2003). The Lay court held:

[if] an employee chooses to sever the employment relationship to accept a better job offer, the employee may not later take advantage of this statute. So long as the return to work is offered, as it was here, an employee who resigns for reasons unrelated to his injury may not escape the statutory caps. Lay, Id. at p. 299.

Here, we are faced with a different situation than was the Supreme Court in Lay.

Bouldin resigned, not to take a better job, but because of reasons reasonably related to his injury. He had a legitimate belief that he was unable to perform his duties safely because of his injuries and impairments. See also, *Hardin v. Royal and Sun Alliance Ins.*, 104 S.W.3d 501. Accordingly, we hold that Bouldin's award is not limited to two and one-half times the impairment rating, and the trial judge was fully justified in making a thirty percent permanent partial disability award.

Conclusion

We hold that an employee's resignation based on employee's legitimate belief that a covered injury prevents the employee from being able to safely perform the duties of his/her job because of the restrictions retained from the injury constitutes a resignation reasonably related to the employee's injury, and will allow the employee to escape the two and one-half times cap. The judgment of the trial court is affirmed. All costs are taxed to the defendant, for which execution may issue if necessary.

John A. Turnbull, Sp. Judge

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the defendants, Warren County Sheriff's Department and Warren County, Tennessee, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM